In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 7 Case
TPI INTERNATIONAL AIRWAYS, INC.	)	Number 91-20162
Debtor	)	
TPI INTERNATIONAL AIRWAYS, INC.	)	
Appellant	)	
v.	)	
THE UNITED STATES TRUSTEE	)	
Appellee	)	

ORDER ON MOTION FOR RULE 60 RELIEF AND FOR DECLARATORY JUDGMENTS

This Court converted the Chapter 11 case of TPI International Airways, Inc., to Chapter 7 in November 1996. The Order was subsequently appealed. After the appeal was dismissed, Frederick R. Catchpole, majority shareholder of the Debtor corporation, filed this Motion on September 3, 1997, in the United States District Court for the Southern District of Georgia. By Order dated February 23, 1998, the Honorable William T. Moore, Jr., United States District Judge, remanded Mr. Catchpole's Motion to this Court for consideration. After preliminary rulings the matter was scheduled for

a hearing on June 4, 1998, and continued by consent of the parties to July 1, 1998. At the hearing on July 1, Mr. Catchpole, the Trustee Ms. Moore, and James Schulz, Assistant United States Attorney representing the United States Federal Aviation Administration and the United States Air Force, announced that Mr. Catchpole's companion Motion for Proof of Authority and Declaratory Judgment (Doc. #336, Exhibit 16)[1] and Motion for Judicial Notice (Doc. #341) were moot and could be considered withdrawn.

The Rule 60 Motion was not resolved. The parties announced, however, that Mr. Catchpole had agreed that the portion of his Rule 60 motion which sought reversal of the conversion of TPI from Chapter 11 to Chapter 7 was no longer in issue. Mr. Catchpole affirmed that he no longer contended that the case should be reconverted from Chapter 7 to Chapter 11. He does not oppose the case concluding under Chapter 7. He still pursues his Rule 60 motion, however, in order to remedy alleged fraud which he believes was committed on this Court during the Chapter 11 proceedings.

The Motion is lengthy and is set forth in thirteen separately numbered paragraphs. Although the Motion had been scheduled for an evidentiary hearing on July 1, it could not be tried on that date because the parties came unprepared to make any evidentiary presentation beyond that which is already of record. Accordingly, the Court conducted a lengthy conference in order to examine the issues remaining, aided by extensive evidence relevant to the Motion which is in the record of this protracted case,

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[1] Judge Moore's Order is docketed in this Court as Number 336; attached to that order are all of the pleadings which were remanded from the district court to this Court. Those pleadings include Mr. Catchpole's Motion for Rule 60 Relief.

and in light of the announcement that reconversion to Chapter 11 was no longer being sought.

When asked to identify from which precise order or judgment he seeks relief, Mr. Catchpole identified three: (1) this Court's Order dated April 12, 1994, staying indefinitely the trial of the issues enumerated in Count I in TPI Int'l Airways, Inc., v. Fed. Aviation Admin., Adv. Pro. No. 91-2030 (Adv. Doc. #68); (2) this Court's Order dated June 24, 1992, granting summary judgment to the United States as to Count II of the same adversary (Adv. Doc. #26) and; (3) this Court's Order dated April 3, 1998, denying Catchpole's motion to amend the adversary to add an additional Count III under Georgia's RICO statute, O.C.G.A. 16-14-1, *et. seq.*, (Adv. Doc. #93).

In light of the issues that remain and the remedies which are sought, upon further review of the pleadings, and consideration of the entire record and applicable authorities, I hold as follows regarding each numbered paragraph of the Motion:

1. The relief sought in this paragraph, requesting the Court to "set aside all prior judgments, orders and decisions in the Bankruptcy Court and other judgments of the District and Appellate Courts where Assistant United States Attorney Ruth Hearn Young represented or acted on behalf of the government," is DENIED. In large measure, this paragraph asks the Court to set aside most, if not all, of the previous orders entered by this Court during the pendency of the Chapter 11 case, including the order converting the case from Chapter 11 to Chapter 7. As such, the relief sought has

largely been withdrawn by Mr. Catchpole. Second, this Court lacks any jurisdiction to set aside judgments of the District or Appellate courts. Third, the alleged violations of 18 U.S.C. § 208 will be dealt with later in this Order. *See* infra, ¶ 13.

2. The relief sought in this paragraph, a declaratory judgment that the government's proof of claim is a fraudulent document, cannot be entertained in a motion proceeding and is therefore DENIED. *See* FED. R. BANKR. P. 7001(9) (requiring that action seeking declaratory judgment be filed as adversary proceeding). Whether any declaratory relief is available in light of the government's withdrawal on July 1, 1998, of its proof of claim is now uncertain. (*See* Doc. #406).

3. This request has been withdrawn by Mr. Catchpole and is therefore STRICKEN.

4. This request has been withdrawn by Mr. Catchpole and is therefore STRICKEN.

5. This request to direct the Office of the United States Trustee to "exercise special diligence in protecting TPI" fails to state a claim upon which relief can be granted. First, it is utterly vague and meaningless. Second, to the extent it can be understood, this Court cannot exceed its jurisdiction by monitoring or supervising the administrative activities of the United States Trustee, part of an independent branch of government. This paragraph thus seeks relief which this Court is not empowered to order

and is therefore DENIED.

6. This paragraph comes closest to mirroring the relief which Mr. Catchpole articulated at the hearing as the purpose of his Motion. The Court will construe Paragraph Six to include his request that this Court's Order staying Count I of the adversary proceeding be set aside, that the order granting summary judgment as to Count II be vacated, and that the order denying Mr. Catchpole's motion to amend be vacated. The relief sought in Paragraph Six is, however, DENIED for two reasons. First, procedurally, the Motion was filed in the case file, but now seeks remedies available only in the adversary proceeding, styled TPI Int'l Airways, Inc., v. Fed. Aviation Admin., Adv. Pro. No. 91-2030. It is axiomatic that "cases" and "proceedings" under Title 11 are separate and distinct. No Rule 60 Motion was filed in the adversary proceeding, and for the reasons enumerated in this Order no relief in the Chapter 7 is still requested. Thus, the Motion fails to seek relief which can be granted.

Second, substantively, were this Court to construe the pleading so liberally as to treat it as if it had been properly filed in the adversary proceeding, nevertheless the Motion is DENIED. The Motion asks that all issues raised in the adversary proceeding be tried. Count I of that adversary proceeding raised an objection by TPI to the FAA proof of claim. The proof of claim was withdrawn by the FAA on July 1, 1998. (Doc. #406). Any objection to a withdrawn claim is moot.[2] By separate order

[2] Ordinarily, a defendant cannot simply cease the complained-of behavior in order to render a controversy moot. U.S. v. W.T. Grant Co., 345 U.S. 629, 632-633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The case "may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." Id. at 633. Count I simply requests that the claim of the United States be

this Court will dismiss Count I. Count II was a damage action seeking $20 million from the FAA. This Court granted Summary Judgment to the United States on June 24, 1992, as to Count II (Adv. Doc. #26). That judgment will not be reconsidered for the following reasons:

(a) None of the allegedly false representations were relied on by the Court in granting summary judgment, nor were they material to the outcome. For the purposes of summary judgment, all evidence is construed in favor of the party opposing the motion. Even under that assumed state of facts, I held:

> *Taking TPI's allegations to be true*, that the FAA did intentionally withhold the operating specifications without just cause and with intent to harm TPI's business interests, such a decision would have been an abuse of discretion, subject to review in an appropriate forum, but could not have been the basis for a tort claim for damages under the FTCA.

See Memorandum and Order, Adv. Pro. No. 91-2030, slip op at 15 (June 24, 1992) (emphasis supplied).

> I conclude that the FAA's decision to commence enforcement actions against TPI was a discretionary administrative decision; therefore the United States and its agency, the FAA, should not be liable in tort for withholding TPI's operating specifications or for any alleged

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disallowed. The United States has withdrawn its proof of claim, the bar date for filing claims has expired, and there will be no dividend to any unsecured creditors in this case. Clearly no possibility exists that the United States will file another claim in this case.

> misrepresentations regarding TPI's violations of FAA rules and regulations. Therefore, Count Two of Debtor's adversary should be dismissed.

Id. at 18.

(b) Further, even if all the allegations about fraudulent actions by government officials are assumed to be true, the FTCA exception at 28 U.S.C. § 2680(h) precludes any recovery as a matter of law, and Defendants remain entitled to summary judgment as a matter of law. U.S. v. Neustadt, 366 U.S. 696, 701-702, 81 S.Ct. 1294, 1298, 6 L.Ed.2d 614 (1961) (misrepresentation and deceit exclusion from FTCA includes both negligent and willful misrepresentation); *see also* Atorie Air v. FAA, 942 F.2d 954, 957 (5th Cir. 1991), *reh'g denied*, (5th Cir. 1991) (claim against FAA for fraud and misrepresentation "squarely barred" by statute); Boda v. U.S., 698 F.2d 1174, 1176 (11th Cir. 1983) (negligence and fraud claims against witness protection program participant, alleged agent of United States, barred by FTCA § 2680(h)).

> . . . [P]laintiffs argue that their case sounds in 'fraudulent inducement,' and not in 'factual misrepresentation.' Such verbal niceties will not remove the case from the exclusionary terms of 2680(h). The language of that section has consistently been broadly construed by the courts to exclude all actions for deceit and misrepresentations whether the misrepresentations were made deliberately, recklessly or negligently . . . . All claims of fraud of any type are excluded from the operation of the Federal Tort Claims Act, and this would include both fraud in factum as well as in inducement, both actual and constructive fraud, intrinsic and extrinsic fraud, and other species of deceit or false representation . . . . it still bottoms on alleged factual misrepresentations and

is barred by 2680(h).

Covington v. U.S., 303 F.Supp. 1145, 1149 (N.D.Miss.1969). *See also* Barnett v. U.S., 651 F.Supp. 615, 619 (S.D.N.Y. 1986) (alleged fraudulent cover-up would be excluded from FTCA).

Mr. Catchpole, individually, attempted to intervene in the adversary proceeding and moved to amend to add Count III. On January 30, 1998, I denied his Motion to Intervene. (Adv.Doc. #84). On April 3, 1998, I held the Motion to Amend a "nullity" in light of the finality of my order denying his Motion to Intervene. (Adv. Doc. #93) The amended complaint remains stricken, since it was not filed by a party to the adversary proceeding. In conclusion, there being no triable issues remaining in the adversary proceeding, the relief requested in Paragraph Six is DENIED.

7. The relief sought in this paragraph, a declaratory judgment, cannot be entertained in a motion proceeding and is therefore DENIED. *See* FED. R.BANKR. P. 7001(9) (requiring that action seeking declaratory judgment be filed as adversary proceeding). Alternatively, this request is adversely controlled by my conclusions on the 18 U.S.C. § 208 issue at ¶ 13, infra.

8. The relief sought in this section requesting the Court to order that all decisions in actions conducted in the District and Appellate Courts be declared "null and voidable" where Assistant United States Attorney Ruth Hearn Young

represented or acted on behalf of the government" is DENIED. This paragraph asks the Court to set aside numerous orders entered during the pendency of the Chapter 11 case, including the order converting the case from Chapter 11 to Chapter 7. As such, the relief sought has largely been withdrawn by Mr. Catchpole. Moreover, this Court lacks any jurisdiction to set aside judgments of the District or Appellate courts. Lastly, the alleged violations of 18 U.S.C. § 208 will be dealt with later in this Order. *See* infra, ¶ 13.

9. The relief sought in Paragraph Nine, to order the government to pay all of TPI and Catchpole's expenses during the pendency of this case, is DENIED because it is in the nature of an action to recover money or property, which requires the filing of an adversary proceeding. *See* FED. R. BANKR. P. 7001(1). In the alternative, it is a claim formerly held by the Debtor TPI International Airways, Inc. By virtue of this Court's Order dated December 31, 1997, TPI's interests were sold and cannot be asserted except by the purchaser of all claims of TPI, which is P&R Investments, Inc. (Doc. #330).

10. This relief cannot be granted because according to Mr. Catchpole, an action is already pending in the United States District Court for the Southern District of Georgia before the Honorable Anthony A. Alaimo, seeking the return of the "operating certificate" and "certificate of convenience and necessity." *See* Hearing Notes of July 1, 1998 (Doc. #405). Alternatively, the claim seeking the return of these certificates is a claim which TPI may not now assert, that claim having been sold to P&R Investments, Inc., by virtue of this Court's Order dated December 31, 1997.

(Doc. #330). Finally, this form of relief requires the filing of an adversary proceeding. *See* FED. R.BANKR. P. 7001(1). Accordingly, the relief sought in this paragraph is DENIED.

11. The relief sought in Paragraph Eleven, to provide TPI at government expense with transcripts of all hearings in the case is DENIED because it is in the nature of an action to recover money or property, which requires the filing of an adversary proceeding. *See* FED. R.BANKR. P. 7001(1). In the alternative, it is a claim formerly held by the Debtor TPI International Airways, Inc. By virtue of this Court's Order dated December 31, 1997, TPI's interests were sold and cannot be asserted except by the purchaser of all claims of TPI, which is P&R Investments, Inc. (Doc. #330).

12. The relief sought in this paragraph, a declaratory judgment, cannot be entertained in a motion proceeding and is therefore DENIED. *See* FED. R.BANKR. P. 7001(9) (requiring that action seeking declaratory judgment be filed as adversary proceeding). Alternatively, this claim is adversely controlled by my findings as to Paragraph Thirteen in that the additional criminal acts alleged are all derivative of and dependent upon first establishing as true the contention that 18 U.S.C. § 208 was violated, a contention that I have now concluded is not supported by the evidence.

13. This paragraph requested the District Judge to make a determination whether a complaint under 28 U.S.C. § 372(c)(1) should be filed. The reason for this request is best summarized by the following quote from Paragraph

Thirteen.

> Upon information and belief, TPI International Airways, Inc., states that Bankruptcy Judge Lamar Davis knew of, or should have known of, the violation of 18 U.S.C. 208 by Assistant United States Attorney Ruth Young . . . . Based on this information the Court is asked to determine whether Judge Davis did or did not know of the relationship between Mrs. Young and Mr. Young. Judge Davis's knowledge of the Young's [sic] relationship is obviously of significance in this case at this time. If Judge Davis did know of the relationship, then he knew, or should have known, of the violation of 18 U.S.C. 208.

(Doc. #336, ¶ 13). The contention that there was a violation of 18 U.S.C. § 208 by Assistant United States Attorney Ruth Young permeates much of this Rule 60 Motion and numerous other pleadings filed by Mr. Catchpole *pro se* or purportedly on behalf of TPI. *See* ¶ 1, 2, 7, 8 and 12, *supra*. Although the Motion requested the District Court to confer with the Chief Judge of the Eleventh Judicial Circuit concerning this matter, the entire pleading was remanded to me for consideration.

The Motion suggests that this Court knew of a criminal violation of 18 U.S.C. § 208. Other pleadings of record in this case suggest that this Court has failed to take appropriate action after being made aware of such allegations. *See e.g.*:

> The basic fairness of the judicial process is diminished in that while the Court has been clearly advised of the fraud, it has taken no steps to correct the problem of the fraud upon the Court and upon TPI that attorney Ruth Young has caused.

See Motion for Leave to Appeal, Doc. #346(a) at p.2-3 (April 10, 1998).

> Assistant United States Attorney Ruth Young is in a conflict of interest situation . . . 28 U.S.C. 529 calls for the Attorney General to provide for the disqualification of officers or employees of the Department of Justice from participation in a particular prosecution if that participation would result in a personal conflict of interest - or the appearance thereof. This Honorable Court will find the appearance of a conflict of interest when it studies the testimony and the written documentation that I have provided.

See Supplement to Memorandum, Doc. #299 (October 9, 1996) (filed by Frederick R. Catchpole).

I construe the Order remanding this Motion to require findings from this Court on the Section 208 issue so as to facilitate the District Court's consideration of what further action, if any, is appropriate. The possibility of a Section 208 violation is also a threshold question as to whether further evidence on the relief sought in paragraphs 1, 2, 7, 8 and 12 needs to be received.

> 18 U.S.C. § 208 provides in relevant part as follows:
>
> (a) Whoever, being an . . . employee of the Executive Branch of the United States government . . . participates personally and substantially as a government . . . employee through . . . the rendering of advice . . . in a judicial . . .

> proceeding . . . in which, to his knowledge, he [or] his spouse . . . has a financial interest - Shall be subject to the penalties set forth in section 216 of this Title.

A. There is No Prohibited Financial Interest

The Court will assume without deciding that some of the elements of an offense under this section were proven by competent evidence - that is: (1) that Assistant United States Attorney Ruth Young was, during a relevant time frame for the purposes of Section 208, married to a partner in the law firm of Hunter, Maclean, Exley and Dunn which represented NMB Bank, a major secured creditor in the case, (2) that she participated personally and substantially within the meaning of Section 208, and (3) that she rendered advice to a government agency which was a client of the Office of the United States Attorney in a judicial proceeding.

Nevertheless her spouse, a partner in the law firm which represented a secured creditor in the case, does not have a "financial interest" in the "judicial proceeding" within the meaning of Section 208 simply because his firm represented a client which did. U.S. v. Tierney, 947 F.2d 854 (8th Cir. 1991), *reh'g denied*, (8th Cir. 1991). The issue in Tierney was the possible disqualification of a prosecutor because her spouse, who did not participate in the case, was a partner in a law firm representing an insurance company. The insurance company had sued the criminal defendant in a civil matter and would benefit in the event the prosecution obtained a guilty verdict. The District Court agreed the client would benefit but found that because the law firm was paid on an hourly basis, the law firm itself would not benefit from a guilty verdict. The husband's interest as a partner in the firm

was therefore too remote and speculative an interest to be prohibited. The Eighth Circuit agreed, rejecting the argument that partners in a firm billing by the hour have a financial interest in winning a law suit because the firm's reputation benefits from victory:

> Although such partners may have an interest in prevailing, we believe that this interest is simply too insubstantial to require disqualification of a partner's spouse in related litigation.

Tierney, 947 F.2d at 865. The Eighth Circuit distinguished cases which would disqualify a judge under similar circumstances. Id. *Cf.* Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); United States v. Conlon, 481 F.Supp. 654, 667 (D.D.C. 1979) (insubstantial financial interests are not prohibited by 18 U.S.C. § 208).

This rationale is compelling. In this Court's experience, it would be unprecedented for counsel to a bank holding a secured claim to be engaged on any basis other than an hourly rate fee basis in a bankruptcy case. The record is clear that Hunter, Maclean, Exley and Dunn, in fact, represented the bank on an hourly rate fee basis. Thus, neither it nor its partners have a direct financial interest in the outcome of the judicial proceeding. Accordingly, Ms. Young's spouse had no financial interest in the litigation before this Court, and no violation of Section 208 occurred when she participated as counsel to the United States in this case.

B. There is No Civil Remedy for a Section 208 Violation

Even if Ms. Young's spouse had a prohibited financial interest in the matter, her participation is not an act or an event which gives rise to a civil remedy in behalf of TPI, its affiliates or its directors and shareholders. Berry v. Abdnor, 1989 WL 46761, (D.D.C., April 20, 1989) (Court refused to declare acts of government officials "null and void" because enforcement of Section 208 is within exclusive prosecutorial authority of Attorney General. No private cause of action for violations of Section 208 exists.), *aff'd*, 901 F.2d 1130 (D.C.Cir. 1990); *see also* Winslow v. Romer, 759 F.Supp. 670, 676 (D. Colo. 1991); Bass Angler Sportsmans Soc'y v. U.S. Steel Corp., et.al., 324 F.Supp. 412, 415 (S.D.Ala. 1971), *aff'd,* 447 F.2d 1304 (5th Cir. 1971).

> Criminal statutes cannot be enforced by civil actions. United States v. Claflin, 97 U.S. 546, 24 L.Ed. 1082 (1878); United States v. Jourden, 193 F. 986 (9th Cir. 1912). Serious constitutional problems are encountered in any attempt to impose criminal sanctions by way of civil procedures. *See* Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), and Lipke v. Lederer, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1922).
>
> Equally important is the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these sanctions. *See* Keenan V. McGrath, 328 F.2d 610 (1st Cir. 1964), and Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961). It has been repeatedly held that the Executive Branch though the Justice Department and the U. S. Attorneys is charged with enforcement of federal criminal law and in this area has broad discretion in determining whether or not to prosecute. In the exercise of such discretion U. S. Attorneys are immune from control or interference through mandamus or otherwise by private citizens or by courts. Smith v. United

> States, 375 F.2d 243 (5th Cir. 1967); United States v. Cox, 342 F.2d 167 (5th Cir. 1965) . . . .
>
> The court concludes that no authority exists for plaintiff to maintain this action to recover fines provided by sections 407 and 411. These sections create a criminal liability. No civil action lies to enforce it; criminal statutes can only be enforced by the government.

Bass Angler, 324 F.Supp. at 415. *See also* City and County of San Francisco v. U.S., 443 F.Supp. 1116 (N.D.Cal. 1977), *aff'd*, 615 F.2d 498 (9th Cir. 1980). These authorities unquestionably require a finding that Mr. Catchpole's effort to nullify, overturn or reverse previous rulings of this Court, a civil action, is not a permitted remedy under 18 U.S.C. § 208.

Moreover, the alleged violation has already been reported directly to prosecutorial authorities who have exclusive jurisdiction to investigate and no additional referral by this Court is necessary. *See* Mr. Catchpole's letters to United States Attorney Harry D. Dixon, Jr., dated July 23 and July 29, 1997, attached as exhibits to Catchpole's Memorandum of Law dated September 3, 1997. (Doc. # 336).

In his response letter dated July 25, 1997, Mr. Dixon, the United States Attorney for the Southern District of Georgia wrote Mr. Catchpole and copied this Court, concluding that no conflict of interest arose out of Ms. Young's participation in the case. *See* unnumbered document filed July 28, 1997, in case number 91-20162. Thus, the office with exclusive jurisdiction to consider and act on these allegations has been notified of

them, and has concluded that there was no prohibited conduct.

C. There Is No Disqualification Under Georgia Law

Married lawyers who are involved in active litigation on opposing sides of a case need not be disqualified. Jones v. Jones, 258 Ga. 353 (1988). In Jones, the Georgia Supreme Court relied on both Formal Opinion 340 of the American Bar Association and ABA Model Rule 1.8(I), which prohibits direct representation by spouses of opposing sides unless consent is obtained. Even under the latter, however, the disqualification is "personal" and is not imputed to members of the firm with whom the lawyers are associated. Thus, Ms. Young's activities might, under the Model Rule, disqualify Mr. Young from directly handling adverse litigation without his client's consent, but would not disqualify his firm. The record is clear, however, that NMB was represented by Marvin Fentress, a partner in the firm, and that Mr. Young never directly represented NMB. NMB was Fentress' client, and when Fentress recently changed firms, NMB remained his client. At all times NMB retained its counsel on an hourly rate, not a contingent fee basis. *See* Hearing notes of June 4, 1998 (Doc. #369).

For the foregoing reasons, the allegations of misconduct prohibited by 18 U.S.C. § 208[3] were not, and are not, actionable.

O R D E R

[3] In Mr. Catchpole's Motion and Memorandum in support he alleges that other criminal statutes were also violated, e.g., 18 U.S.C.§§ 3, 4, 371, 1001 and 28 U.S.C. § 535(b). All of these are derivative of the alleged violation of 28 U.S.C. § 208. Since I have found there to be no Section 208 violation, the remaining statutes alleged to have been violated are likewise inapplicable.

For the foregoing reasons, the Motion for Rule 60 Relief filed by Frederick R. Catchpole is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of July, 1998.